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No. 86-2030

In the Supreme Court of the United States

OCTOBER TERM, 1987

STANLEY ANDRZJEWSKI, ET AL., PETITIONERS

v.

CONSTANCE HORNER, DIRECTOR,
OFFICE OF PERSONNEL MANAGEMENT

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

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Petitioners challenge the court of appeals' decision sustaining the facial validity of OPM's "emergency furlough" regulation, 5 C.F.R. 752.404(d)(2), which provides that the usual requirement of 30 days' advance notice before furloughs does not apply to furloughs necessitated by "sudden emergencies."

1. On December 15, 1981, Congress enacted Public Law No. 97-92, 95 Stat. 1183. This was a "continuing resolution" that provided appropriations for a number of federal agencies and departments for the period extending from December 16, 1981, through March 31, 1982. The continuing resolution stated that, whenever the amount appropriated or authority granted to an agency under the House-passed version of the agency's regular appropriation bill differed from that under the Senate-passed version, "the pertinent project or activity shall be continued under the lesser amount or the more restrictive authority" (§ 101(a)(3), 95 Stat. 1183).

The Mine Safety and Health Administration of the Department of Labor (MSHA) was one of the agencies funded by this continuing resolution. The House-passed version of MSHA's regular appropriation bill (H.R. 4560, 97th Cong., 1st Sess. (1981)) had contained the so-called "Rousselot Amendment" (127 Cong. Rec. 23384 (1981)). That Amendment would have barred MSHA from using appropriated funds for the administration of mine safety and health programs relating to certain surface mining activities. The purpose of the Rousselot Amendment was to resolve a dispute over whether MSHA or the Occupational Safety and Health Administration (OSHA) should inspect certain surface mines. See Pet. App. 4a. The Rousselot Amendment would have terminated MSHA's jurisdiction over 85% of the mines it had theretofore inspected, thus reducing MSHA's personnel requirements by 55% (*ibid.*). However, despite the Rousselot Amendment's severe curtailment in MSHA's activities, Congressman Rousselot neither proposed nor obtained any reduction in the amount that had been appropriated for the agency ($155,734,000) by the bill as it stood prior to his amendment (*ibid.*).

When H.R. 4560 reached the Senate, the Rousselot Amendment was deleted (Pet. App. 4a). The Senate-passed version of MSHA's regular appropriation bill would thus have restored authority for the activities that Congressman Rousselot had sought to eliminate. See S. Rep. 97-268, 97th Cong., 1st Sess. 23 (1981). While thus restoring the scope of MSHA's activities, however, the Senate version of the bill provided MSHA $200,000 less than the House version. See Pet. App. 4a.

2. The Acting Administrator of MSHA interpreted the continuing resolution as requiring the immediate furlough of 139 MSHA employees (Pet. App. 2a). This interpretation was based on the belief that the House-passed version of the agency's appropriation bill, by virtue of the Rous-

selot Amendment, was "more restrictive" (Pub. L. No. 97-92, § 101(a)(3), 95 Stat. 1183) than the Senate-passed version, even though the former would have appropriated more money. MSHA thus construed the continuing resolution as incorporating the Rousselot Amendment by reference (Pet. App. 5a n.3), and it in turn construed the Rousselot Amendment as necessitating a reduction in its appropriation to the extent that the appropriated funds would have been spent on salaries of persons who had been performing the activities prohibited by the Amendment (*id.* at 6a).

Based on this construction of the continuing resolution, the Acting Administrator of MSHA issued, on December 18, 1981, individual notices advising employees that they would be furloughed on January 3, 1982, for a period not to exceed thirty days, or not to extend beyond February 2, 1982 (Pet. App. 6a). The notices cited the continuing resolution as the reason for the furlough, and explained that due to the unforeseeability of the circumstances necessitating the furlough, 30 days' advance written notice and an opportunity to reply, which normally would be provided under 5 U.S.C. 7513(b), were not required here. This latter determination was based on OPM's "emergency furlough" regulation, 5 C.F.R. 752.404(d)(2). That regulation provides that "advance written notice and opportunity to answer are not necessary for furlough without back pay due to unforeseeable circumstances, such as sudden breakdowns in equipment, acts of God, or sudden emergencies requiring immediate curtailment of activities." The employees in question were furloughed, without pay, effective January 3, 1982, for a 30-day period ending on February 2, 1982.

3. Appeals from the agency's action, including those taken by petitioners, were filed in seven Merit Systems Protection Board (MSPB) regions (Pet. App. 21a). Several MSPB presiding officials reversed the furlough actions on

the ground that 5 C.F.R. 752.404(d)(2) was invalid, concluding that the regulation was inconsistent with 5 U.S.C. 7513(b) and with the MSPB's interpretation of that statute in *Cuellar* v. *United States Postal Service,* 8 M.S.P.R. 624 (1981). Pet. App. 23a-24a. Other presiding officials sustained the furloughs, ruling that 5 C.F.R. 752.404(d)(2) was valid and that the regulation had been properly invoked here "because the Congressional action was unforeseeable and not within the discretion of the agency" (Pet. App. 24a). Still other presiding officials "held that any error in not giving 30 days' notice was harmless because the notice and opportunity to respond would have been futile in view of the overwhelming nature of the fiscal catastrophe" (*id.* at 6a).

Petitions for review by the full MSPB were filed by MSHA and the furloughed employees, with OPM and OMB filing briefs as intervenors (Pet. App. 21a-22a). In its final decision issued on November 1, 1984, the MSPB declined to address petitioners' threshold contentions (see *id.* at 25a) that the continuing resolution did not create an emergency within the meaning of 5 C.F.R. 752.404(d)(2), and hence that MSHA had erroneously invoked OPM's emergency furlough regulation. Instead, the MSPB proceeded at once to address the regulation's validity. Adopting the rationale in *Hastie* v. *Department of Agriculture,* 24 M.S.P.R. 64 (1984), which was decided the same day, the MSPB held that the legislative history of the statutory notice requirement for furloughs of 30 days or less showed that the emergency furlough regulation was "clearly inconsistent with [5 U.S.C. 7513(b)] and therefore invalid" (Pet. App. 27a (footnote omitted)). The Board then determined that MSHA's action in ordering the furloughs without any of the procedural protections of 5 U.S.C. 7513(b) was

unlawful and that this constituted harmful error under 5 U.S.C. 7701(c)(2)(A), requiring reversal of the furloughs (Pet. App. 28a-29a).

3. The Court of Appeals for the Federal Circuit reversed the MSPB, Judge Nichols dissenting (Pet. App. 1a-20a). The court of appeals held that the MSPB had erred in declaring the emergency furlough regulation invalid and "remand[ed] for a determination of whether the regulation was properly invoked" (*id.* at 2a).

OPM had argued that its emergency furlough regulation properly found Section 7513(b)'s procedural protections to be inapplicable where furloughs were required by an Act of Congress; any other result, OPM maintained, would require the employing agency to violate the ban on the expenditure of unappropriated funds set forth in the Anti-Deficiency Act, 31 U.S.C. 1341. See Pet. App. 7a. The Federal Circuit stated: "That there is a tension between these two statutory provisions is readily apparent" (*ibid.*). The court of appeals noted that the emergency furlough regulation was entitled to the deference due a long-standing agency interpretation. *Ibid.* (citing *Young* v. *Community Nutrition Institute,* 476 U.S. 974 (1986)). And the court determined that Sections 7512 and 7513 were genuinely ambiguous in their application to emergency situations (Pet. App. 10a).

After examining the purposes underlying the procedural protections of Section 7513(b), the court of appeals concluded that OPM's view, as reflected in the emergency furlough regulation, was reasonable. "If an emergency furlough action is taken because an agency has no choice, rather than for the 'efficiency of the service'—as that term is generally understood—it can reasonably be said that the agency did not 'take an action' covered by [5 U.S.C. 7513]" (Pet. App. 11a). Having thus found that OPM's regulation properly excluded emergency furloughs from the category of actions covered by Section 7513, the court

of appeals concluded that the regulation was valid and remanded the case to the MSPB for a determination whether "the regulation was properly invoked under the circumstances of this case" (Pet. App. 12a).

Judge Nichols dissented, stating that the majority had decided the issues in the wrong order (Pet. App. 13a-15a) and that "if the MSPB was right, it was for the wrong reasons" (*id.* at 19a). Judge Nichols agreed with the majority that the MSPB had erred in holding OPM's emergency furlough regulation "totally invalid" on its face (*id.* at 18a). He pointed out, however, that the "regulation, if valid, yet might not apply to the case before us," and he maintained that the majority should not have considered the regulation's validity without first satisfying itself that the regulation "pertains to this case" (*id.* at 18a, 20a). Judge Nichols then suggested two reasons why the emergency furlough regulation may have been invoked improperly here. First, he suggested that both MSHA and the MSPB had erred in interpreting the continuing resolution "to cut off funding to pay the [employees] in question during a 30-day notice period" (*id.* at 19a). Second, he suggested that the continuing resolution in any event may not have constituted "unforeseeable circumstances" within the meaning of OPM's regulation, and that "the alleged fiscal emergency [was] a myth" (*id.* at 15a, 19a). Judge Nichols acknowledged that his views on this issue were "tentative" inasmuch as "the issue was not briefed or argued" in the Federal Circuit (*id.* at 14a). He therefore concluded that "the appropriate thing to do is * * * vacate and remand" (*id.* at 20a), noting that "the MSPB should go into it on remand and not consider itself bound by my unaided analysis" (*id.* at 14a).[1]

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[1] Although Judge Nichols styled his opinion a "dissenting" opinion (Pet. App. 13a), it might also have been characterized as a concurrence in the judgment, since he agreed with the majority as to the facial validity of OPM's regulation (*id.* at 13a, 18a) and also agreed

4. Although petitioners discuss a number of issues in their petition, the court of appeals made clear that it was deciding one narrow and precisely defined question: "[w]hether the emergency furlough regulation, 5 C.F.R. § 752.404(d)(2), is valid or invalid" (Pet. App. 7a). The Federal Circuit reversed the MSPB on that point and remanded (*id.* at 2a), making clear that it was not deciding two other questions necessary to ultimate disposition of this case—whether MSHA's failure to give 30 days' advance notice of the furloughs, if error, was harmless; and whether the continuing resolution required MSHA to stop paying the furloughed employees (*ibid.*). On the latter point, the court of appeals noted OPM's assertion that MSHA "would have violated 31 U.S.C. § 1341 if the agency had kept petitioners on the payroll." "If that proposition is correct," the court of appeals stated, "it is a legitimate ground for invoking the emergency furlough regulation." Pet. App. 12a. Thus, the questions whether the continuing resolution in fact prevented MSHA from paying the furloughed employees, and whether MHSA's failure to provide procedures, if wrongful, was actually prejudicial, were not decided by the court of appeals and are not before this Court. Rather, those questions must be decided in the first instance by the MSPB on remand.[2]

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that the case should be remanded to the MSPB for consideration of whether the regulation had been properly invoked (*id.* at 14a, 20a). And while Judge Nichols suggested that the court should have first decided the threshold question of the regulation's applicability, he acknowledged that this question had not been addressed in any detail by the MSPB (*id.* at 13a, 19a) and that it had not been "briefed or argued" in the court of appeals (*id.* at 14a).

[2] The court of appeals also noted that it was not even deciding whether the Rousselot Amendment actually was incorporated in the continuing resolution (Pet. App. 5a n.3). The applicability of the Rousselot Amendment and MSHA's interpretation of it are thus likewise open to reexamination by the MSPB on remand.

Under these circumstances, petitioners' challenge to the facial validity of OPM's emergency furlough regulation, whatever the merits of that challenge, is not now ripe for review by this Court. If, as a result of the proceedings on remand, the emergency furlough regulation is held to have been erroneously invoked by MSHA, and if MSHA's failure to provide 30 days' advance notice is held to have been harmful error, petitioners' position will be vindicated and their challenge to the regulation's validity will be moot. If, on the other hand, the government succeeds in demonstrating that the regulation was properly invoked or that the agency's error, if any, was harmless, petitioners will then be able to present their contentions about the regulation's validity to this Court, together with any other claims that they may have, in a petition for a writ of certiorari seeking review of a final judgment against them. Accordingly, review of the court of appeals' decision would be premature at this time.[3]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

CHARLES FRIED
Solicitor General

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[3] Because this case is in an interlocutory posture, we are not responding on the merits to the questions presented by the petition. We will do so if the Court requests.

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